

December 28, 1998

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

850 Union Bank of California Building
900 Fourth Avenue
Seattle, Washington 98164
Telephone (206) 296-4660
Facsimile (206) 296-1654

COMBINED REPORT AND DECISION:

A. SEPA THRESHOLD DETERMINATION APPEAL

B. APPEAL FROM DDES CONDITIONAL USE PERMIT DECISION

SUBJECT: Department of Development and Environmental Services File No. L97AC047
BOULDER CREEK

Appeals of Threshold Determination, Conditional Use Permit,
and Transportation Concurrency Decision

Location: West side of Issaquah-Pine Lake Road, west of main entrance to Klahanie community

Applicant: Simpson Housing Limited Partnership, represented by Richard Wilson
1221 Second Avenue #500, Seattle, WA 98101
Telephone (206) 623-1745 Facsimile (206) 623-7789

Intervenor: City of Issaquah, represented by Dawn Findlay
1601 Fifth Avenue #2100, Seattle, WA 98101-1686
Telephone (206) 447-7000 Facsimile (206) 447-0215

DDES: Gordon Thomson, DDES/Land Use Services Division
900 Oakesdale Avenue SW, Renton, WA 98055
Telephone (206) 296-7286 Facsimile (206) 296-7051

KCDOT: Dick Etherington, King County Department of Transportation
821 Second Avenue MS 65, Seattle, WA 98104
Telephone (206) 689-4709 Facsimile (206) 689-4750

SUMMARY OF DECISION:

Department's Preliminary:	Deny appeals
Department's Final:	Deny appeals
Examiner:	Appeals denied

PRELIMINARY MATTERS:

Appeals filed: July 7 and July 15, 1998

EXAMINER PROCEEDINGS:

Pre-Hearing Conference Opened:	September 10, 1998
Pre-Hearing Conference Continued:	September 17, 1998
Pre-Hearing Conference Continued	September 23, 1998
Pre-Hearing Conference Closed:	September 23, 1998

Hearing Opened:	December 7, 1998
Hearing Continued:	December 8, 1998
Hearing Closed:	December 8, 1998

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES ADDRESSED:

- | | | |
|-----------------|--------------------|------------------------|
| • Concurrence | • Conditional Uses | • Intervention |
| • Road Capacity | • Traffic Impacts | • Traffic Distribution |

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. **Proposal.**

Applicant Simpson Housing Ltd Housing Partnership (hereinafter, “Applicant” or “Simpson”) proposes to construct a 304 unit residential development of townhouses and apartments on 65.15 acres. The appeals reviewed here were based upon an application proposing 384 residential units. However, as a result of settlement discussions with appellants who have now withdrawn and subsequent project redesign, the project scale has been reduced. By reducing the number of units, the project has also substantially increased the distance that constructed improvements will be set back from property boundaries. The proposed development is further described in Exhibit Nos. 8A and 8B.

2. **Department Decision and Recommendation.**

On June 26, 1998, the Department of Development and Environmental Services (the “Department” or “DDES”) approved a conditional use permit to allow construction of 54 townhouse units. The remainder of the project is subject to site plan review and issuance of building permits and grading permits, and are therefore not appealable in the same manner as a conditional use permit. Prior to its conditional use permit decision, the Department issued a mitigated determination of non-significance, subject to three conditions addressing wetland and stream impacts and three additional conditions addressing traffic impacts. These SEPA MDNS conditions are described in pages 2 and 3 of the Department’s report to the hearing examiner (Exhibit No. 1). Having participated in the hearing and having reviewed all testimony and evidence presented by the appellants described below, the Department has not changed its position. The Department recommends that its conditional use report and decision be upheld and that the SEPA threshold determination be denied.

3. **Appeal.**

The sole remaining appeal in this matter is that of the City of Issaquah (the “City” or “Appellant”). The City appeals the SEPA threshold determination, particularly with respect to traffic impacts. A significant portion of the traffic impact review has included transportation concurrency determination by the King County Department of Transportation (“KCDOT”). The initial intervention by the City of Issaquah was opposed by the Appellant. Again, with the original appellants withdrawn, the applicant challenged the continued participation of the City as a party to these proceedings. In both cases, addressing the Examiner’s Rules and the affected substantial property interest of the City, the examiner ruled in favor of the City.

4. **Transportation Concurrency; KCDOT Role.**

Regardless of whatever impression the examiner may have given the parties with respect to the notion of “transportation concurrency certification/determination *appeal*,” no such appeal exists. Having further studied KCC 14.65 and KCC 14.70, it must be conceded that the King County Council provided no avenue for non-applicant appeals from the transportation concurrency determinations of KCDOT.

Nonetheless, transportation concurrency remains a major component of this review. Considering the traffic impact nature of the appeal, a comprehensive SEPA decision cannot be reached without consideration of the transportation concurrency issues.

In order to accommodate orderly review of the transportation concurrency, the examiner has given KCDOT full rights of participation as if KCDOT were also an intervenor. For all practical purposes, the examiner has accepted KCDOT as an intervenor.

5. **The Appeal.**

The City cites notoriously bad traffic conditions at the I-90 freeway exchange at Front Street in Issaquah. The projected LOS for the intersection of the I-90 eastbound ramp and Front Street is “F.” Front Street is located within the City. Other streets and intersections have been cited by the City as problematic. However, the City’s principle focus through the course of the hearing has been the Front Street/I-90 off ramp intersection, the Gilman Boulevard/Front Street intersection, and that segment of Front Street located between those two intersections. The City argues that the traffic impacts upon City streets and intersections have been wholly ignored through the SEPA review (including the transportation concurrency review). The State Department of Highways (“WSDOT”) was consulted and remedies agreed upon (discussed below). However, the City was not consulted in the course of the Department’s SEPA review of the Boulder Creek development.

The City argues that the examiner may remand the matter to DDES but does not have authority to “remedy” any deficiency in the MDNS; that the responsible official failed to consider the cumulative traffic impacts upon the City; that the Department is obligated by case law to address those impacts within the City’s boundaries regardless of whether an interlocal agreement between the City and County exists; and, that there is a probable significant adverse effect upon the City’s transportation facilities resulting from the cumulative effect of Sammamish Plateau traffic and Boulder Creek traffic.

In addition, citing KCC 20.44.040.G, the City argues that the project does not comply with conditional use permit criteria due to adverse effects upon public transportation facilities in the surrounding area of the project, most particularly within the City.

6. **Applicant and DDES Response:**

Although the County has no interlocal agreement with the City to address transportation impacts of projects within County jurisdiction, the County has a firm and active agreement with WSDOT. WSDOT is fully aware of the existing and projected problems at the I-90/Front Street intersection. Pursuant to the County/WSDOT interlocal agreement (as well as WSDOT’s authority to regulate access to I-90) WSDOT reviewed the impacts of the Boulder Creek development and recommended that Simpson pay a voluntary settlement agreement to mitigate impacts to the State facilities by paying mitigation fees to be applied to planned improvements at *I-90/Sunset interchange*. The I-90/Sunset interchange, when complete, will connect to a new “Sammamish Plateau

- access road ("SPAR") that will benefit Boulder Creek and most of the south Sammamish Plateau. The combination of the I-90/Sunset interchange and the SPAR will significantly and substantially reduce the long queues on the I-90 eastbound ramp as well as traffic congestion in the I-90/Front Street vicinity. Thus, the applicant argues, phasing Boulder Creek development or paying impact fees to Issaquah would cause the applicant to "pay twice for the same impacts."
7. Except as noted above, the facts and analysis contained in the Land Use Services Division Conditional Use Permit Report, dated June 26, 1998, are correct and are incorporated here by reference; likewise, the Division's December 7, 1998 SEPA Appeal Report to the Examiner.
 8. Section D of the Division's December 7, 1998 Preliminary Report to the King County Hearing Examiner (Exhibit No. 1) cites the scope and standard of review to be considered by the Examiner. The Division's summary is correct and will be used here. In addition, the following review standards apply:
 - A. WAC 197-11-350(1), -330(1)(c), and -660(1)(3). Each authorize the lead agency (in this case, the Land Use Services Division), when making threshold determinations, to consider mitigating measures that the agency or applicant will implement or mitigating measures which other agencies (whether local, state or federal) would require and enforce for mitigation of an identified significant impact.
 - B. RCW 43.21C.075(3)(d) and KCC 20.44.120 each require that the decision of the Responsible Official shall be entitled to "substantial weight". Having reviewed this "substantial weight" rule, the Washington Supreme Court in Norway Hill Preservation Association v. King County, 87 Wn.2d 267 (1976), determined that the standard of review of any agency "negative threshold determination" is whether the action is "clearly erroneous". Consequently, the administrative decision should be modified or reversed if it is:

...clearly erroneous in view of the entire record as submitted
and the public policy contained in the act of the legislature
authorizing the decision or order.
 9. Any portion of any of the following conclusions which may be construed as a finding is incorporated here by reference.

CONCLUSIONS:

1. Although the Department has disregarded SAVE v. City of Bothell, 89 Wn.2d 862, 869, 576 P.2s 401 (1978), RCW 43.21C.030(2)(c) and WAC 197-11-060(4)(b), a complete and defensible SEPA MDNS threshold determination has resulted nonetheless. This fortuitous result comes from WSDOT's attention to the I-90/Front Street intersection. The I-90/Sunset interchange improvements to which this applicant is required to contribute will obviously achieve the results the City seeks. The City has not convincingly argued to the contrary. Nor have arguments or concerns regarding the possible timing of the SPAR/I-90/Sunset improvements convincingly suggested that the WSDOT program to reduce or eliminate congestion at the I-90/Front Street interchange will fail its purpose or deny concurrency.

2. Regarding congestion between the I-90 off ramp and Gilman Boulevard along Front Street, Conclusion No. 1, preceding, also applies. The benefit that will accrue to these intersections and this street segment is obvious. Further, the City has not shown any notable impact upon this street segment as a result of Boulder Creek. And, as the applicant observed, the conditions along this street segment are not so serious as to cause the City to initiate its own remedies even though the City knows that a significant portion of the congestion results from east bound and west bound left turning vehicles—an irritant that could easily be eliminated by banning such turns.
3. Further, it has not been convincingly argued in this case that the multi-strategy approach of King County and KCDOT fails to take cumulative impacts into consideration. This multi-strategy includes requirements to achieve access consistent with King County road standards; intersection standards (formerly known as road adequacy standards); MPS fee calculation and assessment; TAMS analysis; and concurrency determination.

There is an apparent gap in the County's comprehensive multi-strategy approach. That gap is the "30/20 Rule" contained in KCC 14.65.020.D.2 That is the rule which effectively allows (rhetorically speaking) a thousand subdivisions to slip through the system without ever triggering mitigation requirements for a critical link or intersection when those subdivisions individually do not create a 30 vehicle p.m. peak-hour, peak-direction, direct traffic impact on any critical link or intersection. In this case, however—the case of Boulder Creek and the I-90/Front Street interchange—the hole is patched by the KCDOT/WSDOT interlocal agreement for assessing impact mitigation fees to be directed toward the Sunset interchange construction.

The 30/20 Rule appears to exceed the limit on categorical exemptions set by WAC 197-11-800. It certainly appears to function as a *de facto* categorical exemption. Further, it appears to quantify impact in a manner contrary to WAC 197-11-794. These possible flaws in KCC 14.65.020.D.2 are not addressed in this decision for these reasons:

- A. There has been no showing that the overall outcome is clearly erroneous. On the contrary, as noted elsewhere in these conclusions, the WSDOT/KCDOT interlocal agreement has rescued the Boulder Creek SEPA analysis.
 - B. It is not clearly erroneous for an administrator to faithfully execute adopted ordinance.
 - C. KCC 14.65.020.D.2 will be regarded here as lawful unless shown otherwise upon higher review. Any ruling to the contrary would exceed the examiner's jurisdiction.
4. As noted in Finding No. 8, above, the burden of proof falls on the Appellant in a threshold determination appeal. Considering the preponderance of the evidence, the City has not successfully borne that burden. Considering the above findings of fact and the entire hearing record, it must be concluded that the Division's threshold determination in this matter is not clearly erroneous and therefore cannot be reversed, regardless of however it may have stumbled to that result. (The warning clarion on this issue has been sounded before: The Department cannot ignore extra-jurisdictional impacts in its SEPA review. The absence of an interlocal agreement with a neighboring jurisdiction does not waive that review responsibility.)

5. The threshold determination (and the appeal review of that determination) must be based upon the preponderance of the evidence. The preponderance of the evidence in this case supports the Division's determination.
6. In addition, the following conclusions apply:
 - A. Although the information on which the Department based its threshold determination was insufficient, there is no adequate demonstration that the result achieved is actually erroneous.
 - B. There is a substantial amount of information in the record regarding the various impacts which have been asserted by the Appellant. The Division has not been unaware of these issues and has investigated (and reinvestigated) them, but has arrived at conclusions which differ from the Appellant's. The Division, having had access to the variety of issues and points of view and information expressed by the Appellant and others, maintains its original determination of non-significance. The Division's final judgment in this review will be given substantial weight.
 - C. In view of the entire record as submitted and in view of the State Environmental Policy Act, the Division's decision is not clearly erroneous and is supported by the evidence.
7. The CUP appeal will be denied. The CUP criterion regarding "surrounding traffic" simply does not refer to the intersection(s) at issue in this review. The CUP criteria, of course, were written long before the State Growth Management Act and transportation concurrency rules. The CUP is a decision which examines local compatibility. Thus, when the Department must assure that the CUP "will not adversely affect public services to the surrounding area," *local streets* must be examined. While SEPA may expect more, the CUP criteria do not. The CUP reviewer must consider adequacy of access, frontage improvements, appropriate ingress/egress, sufficient on site parking and other similar public facility related improvements which may affect surrounding conditions. It is not inappropriate to review broader impacts, even extra-jurisdictional impacts (which, in fact, are commanded by SEPA case law). However, such broad review falls under the aegis of SEPA, not CUP criteria.

DECISIONS:

- A. The SEPA threshold determination appeal is DENIED.
- B. The conditional use permit appeal is DENIED.

ORDERED this 28th day of December, 1998.

R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 28th day of December, 1998, to the following parties and interested persons:

Karen & Rich Abel	Mrs. James Hergus	Suzanne Roberts
Sue Albrecht	Paul Herskowitz	Colleen Ross & Kurt Grubaugh
Howard Anderson	Carol Taylor Hilden	Jill Routt
Richard Aramburu	Mark Hinthorne	William Rowe
Karen Armstead	Dr. & Mrs Hodges	Nancy Ryan
Cliff & Karen Axelson	Thomas & Anne Holton	Mohamad Sadri
Joe Baer	Mary Howard	Victor Salemann
W. Kirk & Regina Baker	Roseshel Howe	Russ Salzer
Cynthia Barrett	Trent & Christy Hudak	Alfred & Vivian Sauerbrey
Battiato Residence	R. Incontro	Bill & Jamie Scalyn
Michael Bauer	Kristen & Scot Jarvis	Angelo & Catherine Scarcello
Greg & Nancy Beman	Kim Jeshe	Mark & Helen Schaa
Julie Bennett	Bruce & Denise Johnson	Kimberly Schmittle
Laura Bergstrom	Robert Johnson	Clint Scott
Bob BeVan	James Jordan	Lynn Searing
Paul & Lisa Bialek	Mrs. George Kabat	Audrey & Joe Seitz
Victor Bishop	Tomoaki Kato	Peggy Shaff
Robert & Pamela Bocko	Holly Kimbles	David Sharpless
Christine Bodin	Laughing Meadows	Mark & Debbie Siefertson
Berergere Bottero	Cheryl Leiter	Terry Smith
Kathy Bowsher	Margaret Ann Leroy	Jim Sorenson
Terry & Lori Brady	Russell & Jani Levinson	Robin Stearns
Barbie Bucy	Steven Lieberg	Doug & Gail Stewart
Joanna Buehler	Francis J Lill	Susan & Kevin Sullivan
Mary & Rock Burns	Sue Livingston	Wayne Tanaka
Sally Cadegain	Carrie Lord	Cyndi Thompson
John & Susan Carroll	Patricia Loveall	Liz Tickman
Robert W. Catterall	Lisa Lovin	Sharon Tiernan
Jane Catterson	Shane Lundy	Brian Todd
Martin Chinn	Richard D. MacGibbon	Thuango & Trieu V. Tran
Dale & Helen Christofferson	Linda Matlock	Kathleen Turner
Richard A. Cook	Lois & George May	Colleen Volk
Greg & Jan Cromwell	Ralph & Noreen McBride	Kelley Walsh
Donald Crook	Robynn McNeley	Lanny Webb
Kristin Darnell	Claire McQueen	Floyd & Carol Widmer
Marcia Delaburell	Mitchell Scott Millar	Claire & Mark Willey
Pete & Shirley Diaz	Miller Residence	Dale & Susan Williams
Alice Dibble	Kelley Misner	Ray Wilson
Shirley Dohlgren	Sandra Mizen	Richard Wilson
John J. & Doris Engebretson	Mongean Family	Steve & Rebecca Wilson
Karen & Tim Evenson	Kristine Morgan	Christine Windsor
Kathy Fiascone	Marcia Nance	Lynda & Tim Winter
Dawn Findlay	Maynard Nelsen	Janet Wood
Claudia Frederick	Robert Nunn	Sam & Joanne Wright
Sharon Freechtle	Larry & Erika Nygard	Greg Borba
Michelle Frey	Anissa Pagan	Steve Bottheim
Kathy Gacek	Martha & Kirk Painter	Mason Bowles
Robin Gay	Stephanie Paulsen	Steve Boyce
Cindy & Bruce Gilsdorf	Scott & Liz Pearl	Tracy Daniels
H. Glenn	Sally Pennington	Dick Etherington
Betty Goodman	John Phillips	Barbara Heavey
Kathleen Graves	Brad & Amber Post	Aileen McManus
Tim & Kristin Green	Bruce Poulin	Gordon Thomson
James A. Greenfield	Michael Presley	
Karla & Jeff Greer	Mr. & Mrs. Paul Price	
Edward Grubel	Gene & Phyllis Pugnetti	
Tom & Jeanne Harman	Patti & Tom Rayfield	
Debby & Donna Harvey	Tim & Janet Rekdahl	
Tammy Helbert	Residents of	
Werner & Carol Henn	Residents of	

MINUTES OF THE DECEMBER 7 AND 8, 1998 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L97AC047 - BOULDER CREEK:

R.S. Titus was the Hearing Examiner in this matter. Participating in the hearing were Barbara Heavey, Gordon Thomson, Aileen McManus, Richard Wilson, Dawn Findlay, Victor Bishop, Mark Hinthorne, Victor Salemann, and Paul Herskowitz.

The following exhibits were offered and entered into the record:

Entered at September 23, 1998 pre-hearing conference:

- Exhibit No. A City of Issaquah map of proposed annexations/incorporations, East Sammamish Area
- Exhibit No. B Letter dated March 10, 1998 to Nancy Ryan from Robert Derrick
- Exhibit No. C Reduced-size site map, with townhouse area highlighted in yellow

Entered at December 7, 1998 hearing:

- Exhibit No. 1 Department of Development and Environmental Services Preliminary Report to the Hearing Examiner for the December 7, 1998 public hearing
- Exhibit No. 2 Traffic Impact Analysis dated December 8, 1997
- Exhibit No. 3 Environmental Checklist dated July 1997
- Exhibit No. 4 Department of Development and Environmental Services File No. L97AC047
- Exhibit No. 5 Pre-Hearing Brief from City of Issaquah, with 15 attached exhibits (except #10, which was not admitted)
- Exhibit No. 6 DDES GIS map of recent development applications and approvals on Sammamish Plateau
- Exhibit No. 7 Excerpts from King County Annual Growth Report for 1998
- Exhibit No. 8A Site plan for Boulder Creek, with existing plan on acetate overlay, proposed site plan on paper
- Exhibit No. 8B Site plan for Boulder Creek North, with existing plan on acetate overlay, proposed site plan on paper
- Exhibit No. 9 Resume of Victor Bishop
- Exhibit No. 10 Letter dated October 10, 1997 from WSDOT to Vic Bishop

Entered at December 8, 1998 hearing:

- Exhibit No. 11 Interlocal Agreement between King County and WSDOT

RST:cp/vam
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